STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

JON A. GALLANT, JR., an individual and
MARY T. GALLANT, an individual,

Plaintiffs,

vs

Case No. 12-953-CK
16-1249-VJ-C30

THOMAS P. GALLANT, an individual
GALLANT INDUSTRIAL SERVICES, INC.,
A Michigan corporation, and GALLANT
TRANSPORT, INC., a Michigan corporation

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants/Counter-Plaintiffs,

vs

JON A. GALLANT, JR., an individual,

Counter-Defendant.
_____/

At a session of said Court held in the City of Jackson, County of Jackson, State of Michigan, on the 30th day of March, 2017

PRESENT: Honorable Joyce Draganchuk
Circuit Judge

The counter-claim in this matter was tried before the Court on February 14, 2017. Counsel agreed to submit their closing arguments in writing and the Court established a briefing schedule. The final brief, Counter-Plaintiff's rebuttal closing argument, was received on March 27, 2017.

The Court heard the testimony of witnesses and has judged their credibility and has considered all the exhibits that were admitted into evidence. Counter-Plaintiff has the burden of proof by a preponderance of the evidence. Counter-Defendants bear the burden on the affirmative defense of failure to mitigate. The Court makes the following findings of fact and conclusions of law.

Gallant Transport, Inc. and Gallant Industrial Services, Inc. are owned by Tom Gallant. The companies were originally owned by Tom Gallant's brother, Jon Gallant, and their father, Sam Gallant. Through a series of stock transfers, the companies ended up being owned solely by Tom Gallant.[1] After Jon was no longer an owner, he stayed on as an employee of the Company.

The claim tried before this Court was Tom and the Company's claim of unjust enrichment brought against Jon. Tom claims that Jon has been unjustly enriched because Jon used a company credit card and a company van for his own purposes. Tom is claiming $46,800 for rent on the use of the van and $24,483.69 for reimbursement of personal expenses on the company credit card.

There are three dates that Tom and Jon dispute regarding Jon's continued use of the van and credit card. The first is March 2010. In March 2010, Jon ceased to be an owner of the company. For tax reasons, corporate documents were backdated to reflect that Jon's ownership ended January 1, 2009, which is the second date in issue. Jon continued as an employee of the Company until he was terminated in May 2010.

[1] While the Court usually refrains from sounding casually familiar with parties, referring to them as Defendant/Counter-Plaintiff and Plaintiff/Counter-Defendant is cumbersome. Referring to them as Mr. Gallant also will not suffice for obvious reasons. Therefore, from this point on, Defendant/Counter-Plaintiff will be referred to as Tom and Plaintiff/Counter-Defendant will be referred to as Jon. Their father will be referred to as Sam. Gallant Transport and Gallant Industrial Services will be referred to as the Company.

Sam decided to pay Jon six months of severance pay through December 31, 2010, the third date in issue. Shortly before that date, Sam wrote a letter to Jon (Ex. E) saying that Jon's severance benefits will expire on December 31, 2010 and demanding that the company van and credit cards be returned on or before that date.

Tom has argued that once Jon ceased being an owner on January 1, 2009, he had no right to use the company credit card for his personal expenses. However, Tom also testified that it would be "playing the date game" to view Jon as anything but an owner right up to March 2010.

The Court finds that regardless of whether Jon ceased being an owner on January 1, 2009 or in March 2010, the use of the credit card was authorized by the Company right up to December 31, 2010 when Sam demanded the return of the van and credit cards. As an employee on severance with authorization to use the Company credit card, Jon used the card in exactly the same manner as he had previously used the card. That is, Jon charged personal expenses on the card.

Tom maintains (in his brief) that no one was ever allowed to use the Company credit card for personal expenses. That claim is actually unsupported by Tom's testimony. Tom testified that is was difficult to determine if certain charges he made were business or personal. He also acknowledged that he probably charged some personal expenses and Pete (another Gallant brother) also charged personal expenses. His testimony was that while he may have had a legitimate business charge at, for example, Lowe's, Jon could not have had a legitimate business charge at Lowe's because of the nature of Jon's work for the Company. Finally, Tom also had incredible

recall of some of his charges –remembering that a charge at Target from 2010 was for a coffee pot.

Likewise, Jon had an incredible ability to recall certain charges from years ago and also had some suspect explanations for how those charges were business related. Jon did acknowledge that some of his charges were for personal expenses.

In spite of all the above testimony, the testimony that the Court finds most dispositive on this issue of personal use of the Company credit card came from Tom. Tom acknowledged that he reviewed the credit card statements each month. He looked at each line item on the statement. Jon's use of the credit card was reflected on the monthly statement. Tom had the ability at trial to look at each of Jon's charges and determine whether they were personal or business charges. There is no reason why Tom could not have done the same back when the statement arrived and the payment was being made.

Furthermore, Tom acknowledged that Sam was the only person with authority to tell Jon if indeed he was misusing the Company credit card. Only one time did Tom ever go to Sam and tell him that Jon was using the Company credit card for personal use. There is no evidence that Sam ever did anything about it. Sam's letter is an acknowledgment that Jon had authority to continue using the credit card without limitation until December 31, 2010. Not until then did the authorization cease.

Even thought the authorization to use the credit card ended on December 31, 2010, the Company may not recover for use of the card after that date if it failed to mitigate damages. A person wronged cannot recover for any item of damage which could have been avoided by taking reasonable measures to avoid or minimize the

damage. *Morris* v *Clawson Tank Co*, 459 Mich 256, 263; 587 NW2d 253 (1998), citing *Shiffer* v *Gibraltar School Dist Bd of Ed*, 393 Mich 190, 197; 224 NW2d 255 (1974). The opposing party bears the burden to show failure to mitigate damages. *Higgins* v *Lawrence*, 107 Mich App 178, 181; 309 NW2d 194 (1981).

Tom testified that he cancelled the credit card on February 15, 2011. That was not the first time he had cancelled the card. The first time was on December 16, 2010, but Tom testified that for some reason it did not go through. In any event, cancelling the card on December 16, 2010 would have been contrary to Sam's implicit authorization to use the card until December 31, 2010. If indeed Tom cancelled the card on December 16, 2010, it was done wrongfully.[2]

Moreover, cancelling the card on December 16, 2010 would be insufficient as a reasonable measure to avoid or minimize damage. Once it was known that the cancellation "didn't go through" the Company continued to pay the bill. Tom's testimony is devoid of any efforts he made to contact the credit card company again to inquire as to why the Company received charges on a cancelled card. Tom's suggestion that perhaps Jon called the credit card company and had the card re-instated is based on pure conjecture.

Jon's charges on the credit card continued from January 1, 2011 to February 16, 2011, until the card was finally cancelled. Other than the failed attempt to cancel in December, the Company took no further action until February 15, 2011. On February 15, 2011 –the day after Tom became a sole owner of the Company —the card was cancelled. The ease with which this is done is supported by everyday experience and

[2] The Court will not consider the letter from the Bank of America that was attached to Defendant/Counter-Plaintiff's rebuttal closing statement as the letter was never admitted into evidence at trial.

the fact that Tom had no difficulty cancelling the credit card once he had authority to do so. The Company's claim fails for lack of reasonable measures to avoid or minimize damages.

For the same reasons stated above, Jon had authorization to use the company van until December 31, 2010, according to Sam's letter. The Court rejects Tom's contention that the severance package did not include the use of the van. The letter from Sam (Ex. E) demands return of the van on the same date that the "severance benefits" expire. Tom's letters to Jon also support that Jon had use of the van until December 31, 2010. In Exhibit F, a letter dated January 5, 2011, states "[a]s you are no longer an insured driver under the corporate insurance policy, you must either return the vehicle or communicate in writing your desire to have the title transferred to your name, no later than January 10, 2011." Exhibit G, a letter dated January 1, 2011, states that a monthly rental fee will begin since Jon did not return the van pursuant to notice previously provided.[3] These letters did not start until the December 31, 2010 date passed and Jon did not return the van. Even the very nature of Tom's damages demonstrates that Jon had permission to use the van until December 31, 2010 –Tom is claiming rental fees only for 2011 and six months of 2012. Finally, Jon testified that Sam never asked for return of the van prior to December 31, 2010.

Tom makes several arguments about the use of the van and why the Company could not mitigate damages by retrieving the van. In response, Jon argues that Tom's damages for use of the van are speculative. The Court will dispense with any analysis

[3] The letter is dated 01/01/2010, but the undisputed testimony is that it should have been dated 01/01/2011.

or conclusions about mitigation of damages because the Court agrees with Jon that the damages sought are speculative and based on conjecture.

Over a hearsay objection that was overruled, Tom was allowed to testify about how he determined a fair rental value for the van. The testimony was allowed for the limited purpose of explaining his methodology. Tom arrived at what he considered a "fair-rental value" by searching the website Avis.com and determining that it would cost $1,300 per month plus mileage to rent a mini-van through Avis. He decided to double that amount to arrive at his damages of $46,800. He doubled the amount because "Avis is a business and I'm not and I'm unable to recoup damages and I don't want to rent out a vehicle."

Damages must be proven with reasonable certainty and may not be based on speculation or conjecture. *Ensink* v *Mecosta County Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004). The Company submitted no substantive evidence of the fair-rental value of the van. Tom provided testimony that was admitted only to explain how he went about the calculation of damages.

Even if the testimony were considered substantively, it falls squarely in the category of speculation and conjecture. There is no basis for Tom's method of doubling what a car rental company would charge. True, Avis is in the business of renting cars and the Company is not, but for Tom to simply double the Avis fee is arbitrary. Moreover, Tom's reasoning for doubling the amount is flawed. The measure of damages for unjust enrichment is not what the use of the car cost Tom but rather what the value of the benefit was to Jon.

If Tom had provided *admissible* evidence that the benefit to Jon amounted to the sum that Jon would have had to pay to rent a similar vehicle, then that sum may have been a reasonable measure of damages. But testifying that he went to a website and found a monthly rental fee of $1,300 falls far short of that and doubling that amount is has no basis in fact and does not measure damages for unjust enrichment. In essence, Tom has submitted no substantive evidence of the value of the benefit Jon may have received by using the company van.

IT IS HEREBY ORDERED that Defendant/Counter-Plaintiff's Counter-Claim for unjust enrichment is **DISMISSED** for no cause for action and Defendant/Counter-Plaintiff is awarded no damages on the claim.

This Order resolves the last pending claim and closes this case.

/s/

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Hon. Joyce Draganchuk
Circuit Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the above Findings of Fact and Conclusions of Law upon the attorneys of record by placing said document in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on March 30, 2017.

/s/

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Michael Lewycky
Law Clerk/Court Officer